

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CHARLES FRANK SPENCE,

Petitioner, 2:03-cv-1987-GEB-JFM-P

vs.

ALEXANDER HICKMAN, Warden,

Respondent. ORDER

Petitioner, a state prisoner proceeding pro se, has timely filed a notice of appeal of this court's July 6, 2009 denial of his application for a writ of habeas corpus. Before petitioner can appeal this decision, a certificate of appealability must issue. 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b).

A certificate of appealability may issue under 28 U.S.C. § 2253 "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The certificate of appealability must "indicate which specific issue or issues satisfy" the requirement. 28 U.S.C. § 2253(c)(3).

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1 A certificate of appealability should be granted for any issue that petitioner can
2 demonstrate is ““debatable among jurists of reason,”” could be resolved differently by a different
3 court, or is ““adequate to deserve encouragement to proceed further.”” Jennings v. Woodford,
4 290 F.3d 1006, 1010 (9th Cir. 2002) (quoting Barefoot v. Estelle, 463 U.S. 880, 893 (1983)).¹

5 Petitioner has made a substantial showing of the denial of a constitutional right in
6 the following issues presented in the instant petition: (1) denial of due process and the privilege
7 against self-incrimination by errors in adjudicating petitioner’s motion to exclude his custodial
8 statement as a violation of his Miranda² rights; (2) insufficient evidence of first degree murder;
9 (3) insufficient evidence of special circumstances; and (4) ineffective assistance of counsel in
10 failing to investigate and present evidence of petitioner’s strongest defense, i.e. that his
11 discussions with Smithson amounted only to mere preparation not amounting to aiding and
12 abetting.

13 Accordingly, IT IS HEREBY ORDERED that a certificate of appealability is
14 issued in the present action.

15 Dated: August 13, 2009

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17 GARLAND E. BURRELL, JR.
18 United States District Judge

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26 ¹ Except for the requirement that appealable issues be specifically identified, the standard
for issuance of a certificate of appealability is the same as the standard that applied to issuance of
a certificate of probable cause. Jennings, at 1010.

² In Miranda v. Arizona, the United States Supreme Court held that custodial
interrogation must be preceded by advice to the potential defendant that he has the right to
consult with a lawyer, the right to remain silent and that anything he says can be used in evidence
against him. 384 U.S. 436, 469-73 (1966).